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IN THE

Supreme Court of the United States

OCTOBER TERM
1975

No. 76-88

EDWIN T. POGUE, WARDEN, Nevada State Prisons,
Petitioner,

v.

SYLVESTER JACKSON AZBILL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Edwin T. Pogue, Warden of the Nevada State Prison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 6, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit No. 75–1182, April 6, 1976, not yet reported, and the unpublished Memorandum No. 73–1502, May 3, 1974, of

the United States Court of Appeals for the Ninth Circuit appear in the Appendix hereto. The unpublished opinion of the United States District Court for the District of Nevada appears in the Appendix hereto. The opinion rendered by the Nevada Supreme Court, reported as *Azbill v. State*, 88 Nev. 240, 495 P.2d 1064 (1972), appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 6, 1976. A timely petition for rehearing with suggestion for appropriateness of rehearing *en banc* was denied June 7, 1976; and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Should the case of *Davis v. Alaska*, 415 U.S. 308 (1974) be held to be retroactive in its effect?

2. Did the Court of Appeals for the Ninth Circuit properly apply *Davis v. Alaska, supra*, when the Ninth Circuit held that as a matter of law in light of *Davis* a deliberate by-pass could not occur?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

"In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Constitution of the United States, Amendment XIV, § 1:

". . . [N]or shall any state deprive any person of life, liberty or property without due process of law . . ."

United States Code, Title 28, § 2243:

". . . The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

STATEMENT OF THE CASE

Sylvester Jackson Azbill, a Nevada state prisoner, appealed from an order of the United States District Court for the District of Nevada denying a writ of habeas corpus. The United States Court of Appeals for the Ninth Circuit reversed and remanded the case for further proceedings. The United States District Court for the District of Nevada, pursuant to the Ninth Circuit remand, held an evidentiary hearing to determine whether Azbill had deliberately by-passed state remedies. Subsequently, upon a finding that Azbill had deliberately by-passed state remedies, the District Court denied his petition for writ of habeas corpus. Azbill appealed from this order, and the Ninth Circuit again reversed and remanded for further proceedings. Appellee Edwin T. Pogue, Warden, Nevada State Prison, filed a petition for rehearing with suggestion of appropriateness of a rehearing *en banc* with the Ninth Circuit. The Ninth Circuit denied this petition.

On December 27, 1967, while his wife Rose was lying on a bed, Azbill doused it with charcoal lighter fluid and set it ablaze. Azbill was prosecuted in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, upon Information charging him with murder and arson. His principal defense on the murder charge was that Rose had died prior to the setting of the fire. The jury found Azbill guilty and he was sentenced to imprisonment in the Nevada State Prison for life without possibility of parole.

The State offered at trial some evidence that Rose died from asphyxiation, although its chief witness was Azbill's son, Brad, who was 12 years old at the time and witnessed the commission of

the crime. When first questioned by the police, Brad told them that he had been intoxicated on the day of the fire and remembered nothing. Appearing before the Grand Jury in January of 1968, Brad testified that Rose was not "moving or talking and appeared to be dead . . ." before Azbill set the fire. *Azbill v. State*, 84 Nev. 345, 348, 440 P.2d 1014, 1016 (1968) (dismissing the original indictment). However, at the preliminary hearing and again at the trial, Brad testified that Rose had "raised herself on the bed and mumbled something . . ." as Azbill poured the lighter fluid on her. *Azbill v. State*, 88 Nev. 240, 243, 495 P.2d 1064, 1066 (1972). Appendix A.

On May 6, 1968, between testifying before the Grand Jury and testifying at the Preliminary Hearing in July of 1968, Brad and four of his friends were involved in a car theft. No charges were filed against any of the boys.

Defense counsel sought to bring out the fact on cross-examination of Brad that he had been involved in a juvenile offense during the time between testifying before the Grand Jury and at the Preliminary Hearing and had never been prosecuted on such offense, seeking to elicit that Brad thought he had received some promise or expectation of leniency in exchange for favorable testimony. The District Attorney, outside the presence of the jury, made a motion *in limine* seeking an order from the court which would preclude the defense counsel from making any reference to juvenile offenses. The trial court entered a pre-trial order to the effect that defense counsel could not inquire into the particular facts surrounding any juvenile offenses or alleged juvenile offenses. However, the court added that the defense counsel could develop evidence as to Brad's state of mind such that he would be allowed to ask whether Brad had been promised anything, or thought he had received something, in return for his testimony.

After an extensive cross-examination of Brad, defense counsel

made an offer of proof in the absence of the jury, in which evidence with respect to Brad Azbill's juvenile record or lack thereof was tendered for the purpose of showing bias or prejudice. Pursuant to its previous ruling, the trial court rejected the offer. Defense counsel continued his cross-examination, focusing on Brad's conflicting testimony and his intoxication on the day of the fire.

After his conviction was affirmed by the Nevada Supreme Court [*Azbill v. State*, 88 Nev. 240, 495 P.2d 1064 (1972)], Azbill filed a petition for writ of habeas corpus in the United States District Court for the District of Nevada. The petition was denied, and Azbill appealed from this adverse decision to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals on May 3, 1974, in an unpublished memorandum, remanded the matter to the district court for further proceedings. *Azbill v. Hocker*, No. 73–1502. Appendix B. The court's order directed that upon remand, the district court must determine: (1) whether a deliberate by-pass of state procedures had occurred; and if not, whether Azbill's right of cross-examination was unconstitutionally restricted, within the meaning of *Davis v. Alaska*, 415 U.S. 308 (1974).

Upon remand, the district court held an evidentiary hearing, and as a result of that hearing found that a deliberate by-pass had been conclusively established such that "a deliberate choice was made by trial counsel not to inquire into any expectation of leniency and not to explore the perimeters of the order *in limine*." Appendix C. On the basis of that finding, the district court denied Azbill's petition for writ of habeas corpus.

Azbill subsequently appealed this denial to the Court of Appeals for the Ninth Circuit, which reversed the district court's finding that Azbill had deliberately by-passed state remedies, suggesting that a deliberate by-pass could not be found under *Davis v. Alaska*, *supra*, since such a finding was made on the "erroneous

assumption that counsel could be required to ask Brad *whether* he was biased, [although] counsel was unable to make a record from which to argue *why* [Brad] might have been biased . . .", thus causing the jury to think "that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness . . ." *Azbill v. Pogue*, No. 75–1182. Appendix D.

The petitioner herein then petitioned the Court of Appeals for a rehearing with a suggestion of appropriateness of hearing *en banc*, on the grounds that the district court had made a finding of a deliberate by-pass of state remedies, pursuant to the standards cited by the Court of Appeals in its original remand, that of *United States ex rel. Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973), and that the Court of Appeals, in reversing the district court, inappropriately applied the case of *Davis v. Alaska*, *supra*, in conflict with its prior memorandum in *Azbill v. Hocker*, No. 73–1502, which had directed the district court to determine whether there had been a deliberate by-pass and if not, whether Azbill's right of cross-examination had been unconstitutionally restricted. This petition was denied on June 7, 1976.

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD DETERMINE WHETHER *DAVIS v. ALASKA*, 415 U.S. 308 (1974), SHOULD BE HELD TO BE RETROACTIVE IN ITS EFFECT.

Nothing in *Davis* requires that its holding be applied retrospectively, nor is this petitioner aware of any other cases giving *Davis* retrospective application.

This Court has held ". . . [T]he Constitution neither prohibits nor requires retrospective effect." *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 1737 (1965). This Court there further stated:

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 629.

The alleged unconstitutional restriction on the accused's right to cross-examination in this case took place in May of 1969, while *Davis* was not handed down until February of 1974. Little would be gained by giving retrospective effect to the *Davis* case, and in fact, a great many convictions may be overturned by so doing, and seriously disrupt the administration of criminal justice. See: *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 86 S.Ct. 459 (1966); *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966).

To allow the Ninth Circuit to apply the rule of *Davis* retrospectively in this case would work to set a precedent for its application which would seriously undermine the State's interest in protecting the anonymity of juveniles which it has promised to do. This is a serious matter which should be determined by this Court in light of the grave repercussions it could cause with respect to the administration of criminal justice.

B. THE NINTH CIRCUIT IMPROPERLY APPLIED THE DECISION OF THIS COURT IN *DAVIS v. ALASKA*, 415 U.S. 308 (1974).

This Court in *Davis* held that a petitioner's right to confrontation of witnesses is paramount to the State's policy of protecting juvenile offenders *where necessity is shown*. (Emphasis added.)

However, the case of *Davis* is clearly distinguishable from this case, in that in *Davis* counsel took, in fact, the critical step of attempting to lay a foundation for impeaching the witness. Counsel there asked questions with respect to the witness's state of mind in an attempt to lay a foundation for inquiry into the witness's status as a probationer. These questions were objected to, and these objections were sustained by the trial court in *Davis*. See: 415 U.S. 312, 313. In *Davis*, unlike this case, necessity was shown for the introduction of the facts surrounding the juvenile offense, since the fact that the witness was on probation was relevant and necessary for the defense to show that the witness's testimony may well have been to ward off being himself a suspect. See: 415 U.S. 317, 318.

In this case, the defense counsel contends he only sought to show that Brad believed he had received some help from the district attorney. However, the record reveals that the defense counsel directed no questions to Brad as to Brad's belief that the district attorney had helped him with respect to his alleged juvenile offense in return for his testimony. The trial court's ruling was that "You may not inquire into any juvenile offenses or alleged juvenile offenses that he may have committed." The trial court further said, "You may ask him the question, have any promises or anything been extended to him in return for his testimony in court, and seek to lay grounds for impeachment on that basis." The trial court further stated, "His state of mind—if you ask him was he given anything or promised anything in exchange for his testimony at the preliminary hearing, then you are going to develop his state of mind." Further, the court said, "The only thing I am going to let you go into—if you want to develop his state of mind, fine, but you may not examine him with regard to the factual content of any alleged juvenile offenses which he may or may not have committed. *If you want to develop in some way*

what his state of mind was, if he felt anything was being done for him at the time he testified at the preliminary hearing, fine—go ahead and do it." (Emphasis added.) The trial court there, in keeping with the *Davis* ruling, allowed defense counsel to attack or attempt to attack the credibility of the witness. Thus, there being no attempt by the defense counsel to lay a foundation with questions as to Brad's state of mind, there was no need shown for going further into the facts surrounding the alleged juvenile offense. The necessity for going into the facts surrounding the alleged juvenile offense would only be shown had Brad denied that he believed he had received help from the district attorney in return for his testimony. The failure to ask any questions as to Brad's state of mind with regard to this caused the necessity for going into the facts concerning the alleged juvenile offense not to arise. This is one of the factors that the federal district court relied upon in its finding of a deliberate by-pass of state remedies. Further, since the defense contended only to show what Brad believed, it is doubtful that any introduction of the particular facts and circumstances surrounding the alleged juvenile offense would have been necessary. The record reflects that the defense attorney allegedly had a witness who would testify that Brad Azbill had told him that the district attorney went to bat for him. However, such a witness was never called.

The decision of the Ninth Circuit assumes that on the basis of the limited cross-examination afforded Azbill, "the jury might have thought that defense counsel was engaged in a speculative and baseless line of attack on an apparently blameless witness . . .", citing *Davis v. Alaksa*. However, the court fails to note that such a line of limited cross-examination was never attempted by defense counsel such that the necessity never arose for going into the facts and circumstances of the offenses. This Court clearly held in *Davis* that necessity must be shown before

the State's interest in protecting the promise of anonymity made to juveniles must give way to the accused's right to cross-examination. The Ninth Circuit engages in pure speculation as to what the judge's ruling would have been if questions had been asked and Brad had denied any such belief. If questions had been asked, then this case would have been factually similar to *Davis;* however, those questions were not asked.

Further, the District Court found as a matter of fact that ". . . a deliberate choice was made by trial counsel not to inquire into any expectation of leniency and not to explore the perimeters of the order *in limine*. Appendix C. This was pursuant to the direction of the Ninth Circuit in its original memorandum No. 73–1502, where the court instructed the district court that:

> "[A] two-part determination may be necessary: (1) the district court must determine whether there has been a 'deliberate by-passing of state procedures by the petitioner. If so, the petition may be properly denied. (2) If the district court determines that a 'deliberate by-passing' of state procedures has not occurred, then it must consider whether an improper restriction upon petitioner's right of cross-examination was imposed by the trial court. *Davis v. Alaska* . . ."

The Ninth Circuit panel in its Opinion No. 75–1182 now appears to hold, however, that as a matter of law in light of *Davis* such a by-pass could not have taken place. Petitioner respectfully submits that *Davis* does not stand for such a proposition. The Ninth Circuit, in its opinion, not only improperly applies the law as stated by this Court in *Davis*, but also has given an opinion which conflicts with its previous memorandum in the same case.

The record as a whole, as noted by the District Court, reflects "a deliberate choice by trial counsel" under the standard of *United States ex rel. Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973).

The holding below, if allowed to stand, would be completely subversive to the administration of criminal justice. Further, the decision below substantially undermines the State's ability to keep its promise of anonymity made to juveniles by not upholding the requirement that necessity be shown before this interest must give way to an accused's right to cross-examination. It is important for this Court to elaborate on the decision in *Davis*, since the interest sought to be protected by the State is a valid one that must not be allowed to deteriorate.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted this 19th day of July, 1976.

ROBERT LIST
Attorney General
Counsel for Petitioner

Appendix A

NEVADA SUPREME COURT

SYLVESTER JACKSON AZBILL, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 6122

April 7, 1972 495 P.2d 1064

Appeal from a judgment entered upon a jury verdict from an order denying a motion for a new trial and from an order denying a motion for repayment of costs advanced. Eighth Judicial District Court, Clark County; Alvin N. Wartman, Judge.

Defendant was convicted in the district court of first degree murder and arson and, after motion for new trial was denied, defendant appealed. The Supreme Court, BATJER, J., held that testimony of defendant's son and son's friends implicating defendant in setting of fire in master bedroom of family home, as well as testimony of expert who found human tissue on crutch with which defendant allegedly struck his wife while she lay in bed and testimony of physician who concluded that wife died in the fire, constituted substantial evidence to support convictions.

Judgment entered upon a jury verdict and the order denying a motion for a new trial is affirmed. The order denying a motion for repayment of costs advanced is reversed and remanded.

[Rehearing denied May 19, 1972]

John Manzonie, Wiener, Goldwater & Galatz, of Las Vegas, for Appellant.

Robert List, Attorney General; *Roy A. Woofter*, District Attorney, and *Charles L. Garner* and *Raymond D. Jeffers*, Deputy District Attorneys, Clark County, for Respondent.

OPINION

By the Court, BATJER, J.:

A jury found the appellant guilty of murder in the first degree and set his penalty at life in prison without possibility of parole. The same jury found him guilty of arson in the first degree and he was sentenced to 10 years, both sentences to run concurrently. A motion for a new trial was denied, and this appeal follows.

The appellant and Rose Mapel were married on September 20, 1967. At the time of the marriage she was approximately 20 years his senior. On the evening of December 27, 1967, the charred remains of Rose Mapel Azbill were discovered in the master bedroom of the Mapel-Azbill home at 709 Rancho Drive, Las Vegas, Nevada. The appellant and his son, Brad Azbill, were the only persons immediately present when the disastrous fire started. At the trial Brad testified that sometime during the evening of December 27, 1967, between eight and nine o'clock, he was in the master bedroom of the Mapel-Azbill home with his stepmother, Rose Mapel Azbill, and the appellant. The appellant asked Brad to get him a drink. When Brad returned to the bedroom the appellant stated he was going to kill Rose because she had found out that he had married her for her money and was going to divorce him, and he then requested Brad to get some charcoal lighter fluid. At that time, according to Brad's testimony, the appellant hit Rose several times with his fist and then hit her with his crutch. Upon being hit with the crutch Rose raised herself on the bed and mumbled something. By then the appellant had poured the lighter fluid on the bed. Brad looked away to avoid seeing his father hit Rose, and he suddenly realized that the room was filling with smoke.

On the day of the fire, Mark Hutton and Frank Luhman,

friends of Brad, visited him at the home of his father and stepmother. They arrived between 10 a.m. and 11 a.m. John Hutton, another friend, arrived about 6 p.m. At approximately 6:30 p.m. the appellant and Brad went to the liquor store where the appellant purchased beer and liquor. At about 7 p.m. Brad took a bottle of beer to the decedent and noticed that the bottle of vodka on the floor near the bed contained less than three inches of liquor. At that time Brad observed that the decedent seemed alert and she thanked him for the beer. Just after 7 p.m. Brad went back out to the guest house behind the main house to be with his friends. At about 7:30 p.m. Brad was summoned into the house and told by the appellant that Rose wanted another can of beer. After serving the beer, as requested, Brad returned to the guest house where he remained until he was recalled to the main house by the appellant, just before the fire was started. John Hutton testified that as soon as the television program "Lost in Space" was over he looked toward the main house and saw smoke coming from it. He and the other two boys ran inside the main house where they met Brad, who told them the oven was on fire. They searched the kitchen area and failed to find any fire or smoke, then the appellant told them that the Christmas tree was on fire, but that the fire had been extinguished. After examining the tree the boys found no damage so they began looking around the house and found the smoke was coming from the master bedroom. The smoke prohibited them from entering the room so they went outside, broke the bedroom window and used a garden hose in an attempt to extinguish the fire. It was at this time that they saw the decedent in the flames. They then began yelling for someone to call the fire department and police. There was no cross-examination of John Hutton.

Frank Luhman testified that during the afternoon of the day in question, the appellant was quite drunk and boastful; further, that

in such drunken state, the appellant threw a pen kife at him and then he brought a revolver into the living room and stated he would just as soon kill someone as look at him. The witness further testified that he saw Rose Mapel Azbill on the afternoon prior to her death while he was changing the sheets in the appellant's bedroom and that she appeared to be asleep in her room. At 5:30 in the evening, the appellant requested this witness to get some "girls," in return for such favor he was to be given $100. The witness, in response to the appellant's request, took a taxi but was unable to locate the type of women requested by the appellant.

Upon his return from the unfruitful search, the witness returned to the guest house. At about 8:30 p.m. he saw smoke coming from the main house and went to locate the fire. He corroborated the testimony of John Hutton that they were directed to the oven, and finding no fire there, were told by the appellant that the Christmas tree had been on fire. Having determined that the tree was not damaged he discovered the fire in the bedroom, broke the window into the room, and upon observing a burning body he fainted. Upon cross-examination of this witness, the defense elicited testimony that on the day of the fire Brad was quite intoxicated and that he seemed to be almost falling down from drunkenness. On re-cross-examination the witness was asked why he had not previously told the police or grand jury about the incident with the gun or about going out in the early evening looking for "girls." He replied: "Nobody asked me."

In an attempt to impeach the testimony of the witness, the defense called Joanne Allison, a teacher at the school attended by the witness. She testified that he had a bad reputation for truth and veracity.

Mark Hutton corroborated the testimony about the pen knife and about the appellant's statement that the Christmas tree had been on fire. He also testified that he had not been drinking liquor

that day but that Brad had been drinking but was not drunk. He added that while Brad and the appellant were at the liquor store in the early evening Rose had called for Brad.

The appellant took the stand and simply stated he did not start the fire. There was no cross-examination.

The appellant contends that the trial court erred (1) in denying him the right to impeach the respondent's witness by restricting cross-examination; (2) in giving an "Allen Charge" type of instruction to the jury which coerced them into reaching a verdict; (3) when it commented upon the testimony of an expert witness; (4) when it admitted into evidence colored photographs of the deceased; (5) when it allowed the respondent to impeach its own expert witness, and (6) in refusing to give an instruction which he had requested to the jury. The appellant further contends that the verdict of the jury is not supported by substantial evidence sufficient to justify such finding, and is contrary to the law and the weight of the evidence and that the aggregate of the trial court's error violates federal requirements of due process and constitutes grounds for a new trial.

1. The appellant, during cross-examination of Brad Azbill, Mark Hutton and Frank Luhman, sought to elicit testimony from them that they were involved, on or about May 6, 1968, in taking an automobile belonging to Halliburton Oil Well Cementing Company, without permission or authority, from Las Vegas, Nevada to West Covina, California; that they were arrested by West Covina authorities; that they were subsequently turned over to the juvenile authorities of Los Angeles County and later returned to Las Vegas; and that no further action was taken. The appellant contended that he could properly inquire into the alleged offense for the purpose of showing interest, bias and state of mind of the witnesses.

The trial court by an order approving the respondent's motion

in limine restricted the inquiry as to the alleged offense, but expressly stated that the appellant was not precluded from inquiry into the state of mind of each witness.[1] At various intervals during the trial the appellant made offers of proof as to the unlawful conduct of Brad Azbill, Frank Luhman and Mark Hutton. Each time the trial court made the same ruling for the reasons stated.

The scope and extent of cross-examination is largely within the sound discretion of the trial court and in the absence of abuse of discretion a reversal will not be granted. Smith v. Illinois, 390 U.S. 129 (1968); Beasley v. State, 81 Nev. 431, 404 P.2d 911 (1965); State v. Fitch, 65 Nev. 668, 200 P.2d 991 (1948); State v. McNeil, 53 Nev. 428, 4 P.2d 889 (1931).

NRS 48.020 provides: "No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters or religious belief, or by reason of his conviction of a felony, but such conviction may be shown for the purpose of affecting his credibility. . . ."

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[1] "The Court: All right. The Court's ruling will be this Mr. Wiener (Counsel for the appellant): You may not inquire into any juvenile offenses or alleged juvenile offenses that he may have committed. You may ask him the question: 'Have any promises or anything been extended to him in return for his testimony in court,' and seek to lay a grounds for impeachment on that basis, but in the specific of things, juvenile offenses which he may or may not have committed, you may not examine him with regard to those. His state of mind, if you ask him, was he given anything or promised anything in exchange for his testimony at the time of the preliminary hearing, then you are going to develop his state of mind.

"The only thing that I'm going to permit you to go into, if you want to try and develop his state of mind, fine; but you may not examine him with regard to the factual content of any alleged juvenile offense which he may or may not have committed. If you want to develop in some way what his state of mind was, if he felt anything was being done for him at the time he testified at the preliminary hearing, fine; go ahead and do it, but I'm not going to let you examine him, factually speaking, with regard to his juvenile offense."

Although this court has indicated that within the limits of the exercise of sound discretion a cross-examiner must be permitted to elicit any facts which show bias, interest or similar feelings which may color the witness's testimony (State v. Fitch, supra), it is the established law in this state that the credibility of a witness may be attacked by showing his conviction of a felony but not by his mere arrest. Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966). However, the appellant cites Alford v. United States, 282 U.S. 687 (1931), for the proposition that upon cross-examination, for the purpose of establishing interest, bias or motive to testify falsely, some inquiry of the witness concerning his unlawful conduct may be permitted although there has been no felony conviction. Relying upon that case he claims that his constitutional rights were violated by the trial court's order *in limine* which precluded him from showing the interest, bias and state of mind of the juvenile witnesess. He contends that he should have been allowed to show not only the facts surrounding the taking of the automobile but also the fact that up to the time of his trial the juveniles had not even been charged with an act of delinquency.

The appellant's contention is without merit. The trial judge specifically afforded him the opportunity to inquire into any expectation of leniency. However, the appellant insisted upon an "all or nothing at all" position and he made no attempt to lay a foundation for any questions or to explore the perimeters of the order *in limine* and refused to further pursue cross-examination of the juvenile witnesses. Johnson v. State, supra.

2. During its charge to the jury the trial court instructed them as follows: "The Court instructs the Jury that although the verdict to which each Juror agrees must, of course, be his own conclusion, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result the jurors should examine with candor the questions submitted to

them, with due regard and deference to the opinions of each other. A dissenting juror should consider whether the doubt in his mind is a reasonable one, when it makes no impression on the minds of so many jurors equally honest, equally intelligent with him, who have heard the same evidence, with an equal desire to arrive at the truth, under the sanction of the same oath. You are not to give up a conscientious conclusion after you have reached such a conclusion finally, but it is your duty to confer with your fellow jurors carefully and earnestly and with a desire to do absolute justice both to the State and to the defendant."

The appellant took specific exception to this instruction upon the ground that it was an "Allen Charge" which has been condemned in a number of jurisdictions.

The name is derived from the case of Allen v. United States, 164 U.S. 492 (1896), in which the High Court approved a similar charge.[2]

In State v. Hall, 54 Nev. 213, 13 P.2d 624 (1932), this court held that an instruction very similar in wording to the "Allen Charge" was within the discretion of the trial court to give if it thought proper to do so. In Basurto v. State, 86 Nev. 567, 570,

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[2]The charge in *Allen* was substantially as follows: "[A]lthough the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority."

472 P.2d 339 (1970), we considered an instruction identical to the one given here and we said: "The charge is approved so long as it makes clear to the jury that each member has a duty to conscientiously adhere to his own honest opinion and the charge avoids creating the impression that there is anything improper, questionable or contrary to good conscience for a jury to create a mistrial. . . . In this case the charge was clear that no juror was to give up any conscientious conviction he may hold. The coercive language and effect of State v. Hall [supra], is absent and this is desirable. While the choice of State v. Hall, supra, as against this new look is not now squarely presented our preference is expressed in this opinion. The 'dynamite' charge should be avoided.

A careful comparison of the instruction given in this case and in *Basurto* with the original "Allen Charge" indicates that those instructions are far less coercive than the original "Allen Charge" and they do make it clear to the jury that each member has a duty to adhere to his own honest opinion and they avoid creating the impression that there is anything improper, questionable or contrary to good conscience for a jury to create a mistrial. We find no error in the giving of instruction 52 in this case, however, as we did in *Basurto*, we again insist that the "dynamite or Allen Charge" should be avoided and that there should be an abandonment of all judicial interference in jury deliberations. Posey v. United States, 416 F.2d 545 (5th Cir. 1969); United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969).

3. During the course of the trial the presiding judge used the phrase "your best guess"[3] in questioning an expert witness. The

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[3]Judge Alvin Wartman, the trial judge, entered into the following question and answer colloquy with the witness, Dr. John Wesley Grayson, Jr.:

"Q. And your opinion as to the most probable cause of death is not that it was traumatic but that it was due to a combination of alcohol and barbiturates?

"A. I think that is the most probable. . . .

"THE COURT: . . . Do you mean to a medical certainty?

"A. . . . I don't really understand precisely the phrase 'medical certainty.'

"THE COURT: Well, in other words, are you saying this is your best guess on the basis of what we have at the present time.

"A. Precisely."

appellant asserts that the use of the word "guess" amounted to a prejudicial comment by the trial judge on the testimony.

A trial judge has the right to examine witnesses for the purpose of establishing the truth or clarifying testimony, but in doing so he must not become an advocate for either party, nor conduct himself in such a manner as to give the jury an impression of his feelings. Hernandez v. State, 87 Nev. 553, 490 P.2d 1245 (1971); People v. Rigney, 359 P.2d 23 (Cal. 1961); People v. Smith, 165 N.E.2d 333 (Ill. 1960); Baldwin v. District of Columbia, 183 A.2d 566 (D.C.Mun.Ct.App. 1962). Furthermore, under the guise of examining a witness, a trial judge must not comment on the evidence or attempt to mislead the jury or belittle or cast aspersions on a witness. Hernandez v. State, supra; Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970); Kinna v. State, 84 Nev. 642, 447 P.2d 32 (1968); People v. Rigney, supra; Peterson v. Silver Peak, 37 Nev. 117, 140 P. 519 (1914).

We have reviewed the record in this case and are lead to the conclusion that the questioning by the trial court was for the sole purpose of eliciting the truth and to make more understandable the conclusions of the expert witness. It cannot be said that the employment of the phrase "your best guess" in the context of the examination was a comment on the evidence, nor an expression of

the trial judge's feelings. Nor can it be said that the question was calculated to mislead the jury or belittle the witness.

4. Relative to proof that carbon monoxide was induced into the blood stream through the lungs of the victim at the time of the fire, certain colored photographs were admitted into evidence to show the color of the victim's blood. The appellant claims that the pictures were without a scientific purpose, that their presence only inflamed the minds of the jurors and that the trial court erred when they were admitted. We do not agree. Because the inhalation of carbon monoxide can affect the color of blood, a color photograph showing the color of the blood of the deceased was highly probative of whether or not she inhaled carbon monoxide during the fire.

The purpose of a trial is to ascertain and disclose the truth and any evidence which is relevant to that purpose is admissible. Here the color photographs were properly admitted because their probative value outweighed any prejudicial effect they might have had on the jury. Shuff v. State, 86 Nev. 736, 476 P.2d 22 (1970); Walker v. State, 85 Nev. 337, 455 P.2d 34 (1969); Langley v. State, 84 Nev. 295, 439 P.2d 986 (1968); Morford v. State, 80 Nev. 438, 395 P.2d 861 (1964).

5. Dr. John Wesley Grayson, Jr., and Dr. Thorne Jefferson Butler, witnesses for the state, both testified that the more probable cause of death of Rose Mapel Azbill was the use of a combination of ethanol and barbiturates. Dr. Joseph Alexander Jachimczyk, also a witness for the state, testified that her death was caused by the fire. The appellant objected to Dr. Jachimczyk's testimony upon the ground that its purpose was to impeach the testimony of Dr. Grayson and Dr. Butler. The trial court correctly found that the testimony of Dr. Jachimczyk was contradictory in nature and not for the purpose of impeachment and

overruled the objection. In overruling the appellant's objection the trial court limited Dr. Jachimczyk's testimony to his opinions based on the independent research and observations and precluded him from in any way voicing an opinion on the testimony of Dr. Grayson and Dr. Butler.

Impeachment is an attack upon the credibility of a witness and usually may not be done by the party calling the witness, but he has a right to offer evidence showing facts to be different from those testified to by such witness and in that manner contradict his own witness. United States v. Williamson, 424 F.2d 353 (5th Cir. 1970); Commonwealth v. Staino, 204 A.2d 664 (Pa. 1964); State v. Winters, 344 P.2d 526 (Wash. 1959); State v. Timm, 12 N.W.2d 670 (Wis. 1944); Cahow v. Michelas, 62 Nev. 295, 149 P.2d 233 (1944); Nevada R. & S. Co. v. Grich, 59 Nev. 345, 93 P.2d 513 (1939); Wigmore, Evidence 3d ed., Vol. 3A 694–698 (1970); 98 C.J.S. Witnesses § 630.

In Talley v. Richart, 185 S.W.2d 23, 26 (Mo. 1945), that court said: "It is well settled a party may contradict his own witness by independent evidence showing facts to be different from those testified to by such witness. . . . Such rule does not violate the general rule that one may not impeach his own witness because to contradict is not to impeach. The terms are not synonymous. Impeachment is directed to the credibility of the witness for the purpose of discrediting him. It ordinarily furnishes no factual evidence. Contradiction, on the other hand, is directed to the accuracy of testimony and supplies additional factual evidence to be considered along with such testimony. Such evidence as is relevant to the issues may not be excluded because it contradicts another witness called by the same party, whether such witness is friendly or hostile."

In the present case the state did not seek to prove by Dr.

Jachimczyk that either Dr. Grayson or Dr. Butler had at some previous time made contrary statements, but only to produce independent evidence that Rose Mapel Azbill's death had been caused by the fire. This the state was permitted to do and the trial court committed no error in permitting Dr. Jachimczyk to testify.

6. The appellant offered the following jury instruction which was rejected by the trial court: "In order to find the defendant guilty of homicide there must be an expert medical opinion worthy of belief and proving beyond a reasonable doubt fire was the cause of death."

The trial court properly rejected the offered instruction. After examining all of the instructions given by the trial court, and in particular instruction No. 19,[4] it is our opinion that the subject matter was properly and fully treated in the other instructions. It is the established law of this state that a trial court does not commit error when it refuses to give an offered instruction if the content of that instruction is covered in other instructions, even though the offered instruction correctly states the law. Summers v. State, 86 Nev. 210, 467 P.2d 98 (1970); Wallace v. State, 84 Nev. 603, 447 P.2d 30 (1968); Carlson v. State, 84 Nev. 534, 445 P.2d 157 (1968).

The appellant contends that the jury verdict is not supported by substantial evidence and is contrary to the law and the weight of the evidence. If there is substantial evidence to support a jury verdict neither the trial court nor this court will disturb it. McGuire v. State, 86 Nev. 262, 468 P.2d 12 (1970); Lamb v. Holsten, 85 Nev. 566, 459 P.2d 771 (1969); Tellis v. State, 85 Nev. 679, 462 P.2d 526 (1969); Criswell v. State, 84 Nev. 459,

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[4]Instruction number 19: "You may not speculate that a criminal agency caused the death of Rose Azbill. Death by a criminal means must be proven by evidence, proving beyond a reasonable doubt that said death was by a criminal means."

443 P.2d 552 (1968); Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968).

We find that although there was conflicting evidence, and in particular concerning the cause of death, there was substantial evidence to support the verdict in this case. The testimony of Brad Azbill and friends, as well as the testimony of the expert who found human tissue on the crutch, together with the testimony of the doctor who concluded that Rose Azbill died in the fire, is such substantial evidence.

Where questions of fact are dependent upon the credibility of witnesses, the jury is entitled to decide questions of credibility and the weight to be attached to their testimony. Martinez v. State, 77 Nev. 184, 360 P.2d 836 (1961).

In all criminal proceedings the weight and sufficiency of the evidence are questions for the jury, and its verdict will not be disturbed upon appeal if there is evidence to support it. The evidence cannot be weighed by this court. Nev. Const. art. 6, § 4; NRS 177.025; State v. Butner, 66 Nev. 127, 206 P.2d 253 (1949); State v. Soares, 53 Nev. 235, 296 P. 1081 (1931); State v. Watts, 52 Nev. 453, 290 P. 732 (1930); State v. Boyle, 49 Nev. 386, 248 P. 48 (1926); State v. Van Winkle, 6 Nev. 340 (1871).

7. As his final assignment of error the appellant claims that the trial court erred when it denied his motion, as an indigent, for an order directing Clark County to reimburse his attorney for costs advanced in his defense.

On May 9, 1968, the appellant filed a motion requesting that Clark County pay the expenses for a medical expert to make studies in the case on his behalf, based on his affidavit that he was indigent. This motion was granted on May 19, 1969. On October 7, 1969, the trial court ordered Clark County to reimburse the appellant's counsel for monies advanced to Dr. Henry, a defense

pathologist. But when appellant moved for an order directing Clark County to reimburse his attorneys for costs advanced, the motion was denied.

In State v. District Court, 85 Nev. 241, 245, 453 P.2d 421 (1969), this court stated: "Holding, as we do, that an indigent defendant's constitutional rights require reimbursement to his counsel for out-of-pocket expenses incidental to his defense, the trial courts have the inherent right to entertain motions seeking such allowances and to order payment of such reasonable amounts as they, in their discretion, deem proper and necessary."

Here the trial court did entertain motions of the appellant for reimbursement of his counsel and on May 19, 1969, it found the appellant to be an indigent and allowed expenses for a medical expert. At that time appellant's status as an indigent was confirmed and all out-of-pocket expenses incidental to his defense incurred after that date by his counsel are reimbursable.

We affirm the jury's verdict and the judgment of the trial court, but remand the matter to the district court for the sole purpose of determining the reimbursable out-of-pocket expenses incurred by the appellant's attorneys from and after May 19, 1969, to and including September 25, 1969.

ZENOFF, C. J., and MOWBRAY, THOMPSON, and GUNDERSON, JJ., concur.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73–1502

SYLVESTER JACKSON AZBILL,

Petitioner-Appellant,

vs.

CARL G. HOCKER, Warden,

Respondent-Appellee.

MEMORANDUM

[May 3, 1974]

Appeal from the United States District Court for the District of Nevada

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Before: ELY and WALLACE, Circuit Judges, and LINDBERG,* District Judge

The January 31, 1973, order of the district court denying Azbill's petition for a writ of habeas corpus is vacated.

The merits of petitioner's federal claim have not been adjudicated by the state or federal courts. The Supreme Court of Nevada in *Azbill v. Nevada*, 495 P.2d 1064 (1972), refused to consider the claim that petitioner's right of cross-examination was

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*The Honorable William J. Lindberg, Senior United States District Judge, Seattle, Washington, sitting by designation.

improperly restricted. In the opinion of that court it was observed, *Azbill v. Nevada*, *supra* at 1068:

> The [petitioner's] contention is without merit. The trial judge specifically afforded him the opportunity to inquire into any expectation of leniency. However, the [petitioner] insisted upon an 'all or nothing at all' position and he made no attempt to lay a foundation for any questions or to explore the perimeters of the order *in limine* and refused to further pursue cross-examination of the juvenile witnesses.

And the district court, in support of its January 31, 1973 order, observed that it was not an unconstitutional deprivation of the right of cross-examination for a trial court to follow, *Order* at page 12:

> a rule of state procedure which precludes the consideration of error when the [petitioner] deliberately refuses to ask questions in an area which has not been foreclosed by any reasonable interpretation of the court's rulings.

Both the state and federal courts held that failure to lay a foundation for the prohibited cross-examination barred treatment of petitioner's constitutional claim.

It was decided in *Fay v. Noia*, 372 U.S. 391 (1963) that all state procedural rules which define how federal constitutional issues should be litigated in state criminal courts will, for purposes of habeas corpus review, be conclusively deemed to be constitutionally inadequate. The Supreme Court in *Fay v. Noia*, *supra*, at 439, also noted:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state court, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claim on the merits—though of course

> only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. . . . At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question.

Thus, the existence of a rule of state procedure requiring petitioner to ask foundation questions in order to preserve his constitutional claim should not have barred the district court from considering the constitutional claim. Only where a "deliberate by-passing" of state procedure has occurred may the district court decline to adjudicate the petitioner's constitutional claim.

It is not clear from the order of the district court whether the appropriate "deliberate by-passing" standard was employed. Moreover, there does appear to be some question, upon the record as it now stands, whether the crucial incidents in this case attain the stature of a "deliberate by-passing." The facts concerning petitioner's involvement in counsel's approach at trial have not been well-developed. *United States ex rel Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973). Consequently this court has determined to remand the matter to the district court for further proceedings.

Upon remand a two-part determination may be necessary: (1) The district court must determine whether there has been a "deliberate by-passing" of state procedures by the petitioner. If so, the petition may properly be denied. (2) If the district court determines that a "deliberate by-passing" of state procedures has not occurred, then it must consider whether an improper restriction upon petitioner's right of cross-examination was imposed by the

trial court. *Davis v. Alaska*, ... U.S. ..... (February 27, 1974). Should the district court determine that a conclusive showing of "deliberate by-passing" has not been made, the district court may wish to hold further consideration of Azbill's petition in abeyance for a reasonable period so as to afford the Supreme Court of Nevada the first opportunity to consider the relief available to Azbill under *Davis v. Alaska, supra.*

Reversed and remanded, with directions.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R–2728 BRT

SYLVESTER JACKSON AZBILL,

Petitioner,

vs.

CARL G. HOCKER, et al,

Respondents.

ORDER

[Filed October 17, 1974]

Petitioner was convicted in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, of the crime of murder in the first degree and was sentenced to imprisonment in the Nevada State Prison for life without the possibility of parole. Petitioner sought review of the conviction in this Court by way of a petition for a writ of habeas corpus, challenging what he terms as the improper curtailment of his right of cross-examination by the trial court. The petition was dismissed and Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals reversed and remanded the matter to this Court for further proceedings. Trial was had September 6, 1974.

The issue this Court must decide is whether the crucial incidents in this case attain the stature of a "deliberate by-passing" of state procedure.

The Supreme Court, in *Fay v. Noia*, 372 U.S. 391, 438 (1963), established the controlling standard for a waiver:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas corpus to deny him all relief if the state courts refused to entertain his federal claims on the merits."

This standard has been elaborated on in *United States ex rel. Allum* v. *Twomey*, 484 F.2d 740, 744 (7th Cir. 1973):

> "If counsel is to have the responsibility for conducting a contested criminal trial, quite obviously he must have the authority to make important tactical decisions promptly as a trial progresses. The very reasons why counsel's participation is of such critical importance in assuring a fair trial for the defendant, see Powell v. Alabama, 287 U.S. 45, 68–69, 53 S.Ct. 55, 77 L.Ed. 158, make it inappropriate to require that his tactical decisions always be personally approved, or even thoroughly understood, by his client. Unquestionably, assuming the lawyer's competence, the client must accept the consequences of his trial strategy. * * * The question of whether there has been an effective (or "deliberate") waiver turns, we believe, not on subjective motivation, but on an evaluation of the act or omission giving rise to the waiver, as well as the significance of its consequences."

So analyzed, this Court is persuaded that defense counsel's refusal to pursue the matter of a leniency offer and counsel's neglect to explore the perimeters of the order in limine gave rise to the kind of waiver that should be placed in the same category of a "deliberate by-pass" of state remedies, barring subsequent collateral attack in the federal courts.

The facts which this Court finds persuasive are these:

Petitioner retained competent and experienced trial counsel and placed full reliance in them. Petitioner's involvement in counsel's approach at trial was very minimal and did not involve the cross-examination of witnesses. The conduct of the trial was counsel's responsibility. Counsel was afforded the opportunity to inquire into any expectation of leniency any witness might have held. At the most recent hearing, defense counsel responded to questions at page 22 as follows:

> "Q. Did you ask him whether or not the District Attorney or anyone had promised him leniency or any favors of any kind?
>
> "A. No, I did not.
>
> "Q. Can you tell us why you did not ask the question?
>
> "A. Yes. I felt that if I asked him the question that Judge Wartman had said I could ask him, but was restricted by Judge Wartman's order not to go into the alleged juvenile offense, that no matter what response I got, I would be trapped, in this way: that if Brad Azbill testified that he expected leniency or had been promised leniency, and I would not be able to ask him for what offense, or if it was for an alleged offense of a stolen car being taken across the state line, that I would—and not be able to establish the time of the leniency—or the time of the alleged offense for which he was being given leniency, I could do nothing but hoist myself in an embarrassing position of just being nowhere.
>
> "If he said, no, that he hadn't expected leniency, or been promised leniency, and I couldn't ask him about the offense and whether anything had been done or whether he had been taken to juvenile home or incarcerated, I would be caught in an untenable position by virtue of that.
>
> "So I felt no matter what the answer was, with the direction of the Court to not go into the alleged juvenile offense, I was then trapped. And for that reason I didn't ask him the

question, because I felt that I was just put in an untenable position by the Court's direction, and I didn't want to be held in contempt in the middle of the trial.

"Q. Could you, in your own mind, Mr. Wiener, have laid any further foundation under this particular Court ruling of Judge Wartman?

"A. In my opinion, I couldn't; because no matter what the answer was, I was trapped by not being able to ask the next question about when the offense for which he may or not have been promised leniency took place, what the nature of the offense was, whether it was one that was of a serious nature or an inconsequential nature, because I felt it was mandatory to bring out the nature of the offense, for, if he said he had been promised leniency and it was for a truancy, or it had happened after the preliminary hearing, it would be a minor thing; if it happened after the preliminary hearing, it wouldn't even be binding, wouldn't be of any effect, I should say, because it didn't give a reason for changing the testimony between the Grand Jury testimony, his statements to the Sheriff, to the District Attorney and the statements to the Police Department and the statements he later gave at the preliminary."

This testimony and the record as a whole support this Court's finding that a deliberate choice was made by trial counsel not to inquire into any expectation of leniency and not to explore the perimeters of the order in limine. This Court finds, under the standard of the *Twomey* case, that a competent and considered value judgment abandoning the issue of further cross-examination by competent counsel clearly and conclusively establishes a deliberate by-pass. In his own words, defense counsel felt trapped. He made the judgment to proceed no further. It was a deliberate strategic move on counsel's part.

Further elucidation of the factual background is found in this Court's order entered January 31, 1973. We there commented on

the difficulties faced when an advance ruling on evidence is sought by a motion in limine. It is incumbent on counsel to go as far as reasonably indicated to permit the Court to reconsider and perhaps revise the initial ruling.

Accordingly,

IT HEREBY IS ORDERED that the petition for a writ of habeas corpus be, and it hereby is, denied.

Dated: October 17, 1974.

BRUCE R. THOMPSON,
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75–1182

SYLVESTER JACKSON AZBILL,

Petitioner-Appellant,

vs.

EDWIN T. POGUE, Warden, Nevada State Prison, State of Nevada,

Respondent-Appellee.

OPINION

[Filed April 6, 1976]

Appeal from the United States District Court for the District of Nevada

Before: CHAMBERS, DUNIWAY and WRIGHT, Circuit Judges

DUNIWAY, Circuit Judge:

Azbill, a Nevada state prisoner, appeals from an order denying a writ of habeas corpus. We reverse and remand.

On December 27, 1967, while his wife Rose was lying on a bed, Azbill doused it with charcoal lighter fluid and set it ablaze. Charged with murder, his principal defense was that Rose had died before the fire was set. He was convicted and sentenced to life without possibility of parole. While the state offered some evidence that Rose had died from asphyxiation,[1] its chief witness was

Brad Azbill, petitioner's son, who was 12 years old at the time and saw the crime committed. When first questioned by police, Brad told them that he was intoxicated on the day of the fire and remembered nothing. During his appearance before the Grand Jury in January, 1968, Brad said that Rose was not "moving or talking and appeared to be dead . . ." before petitioner set the fire. *Azbill v. State*, 1968, 84 Nev. 345, 348, 440 P.2d 1014, 1016 (dismissing the original indictment). During the preliminary hearing and again at trial, Brad testified that Rose had "raised herself on the bed and mumbled something . . ." as Azbill was pouring lighter fluid around her. *Azbill v. State*, 1972, 88 Nev. 240, 243, 495 P.2d 1064, 1066.

Azbill's counsel sought to show that Brad had changed his testimony because he thought the District Attorney had intervened on his behalf with juvenile authorities to get them to withhold charges against him in connection with an automobile theft.[2] In a pre-trial order, the state trial judge prohibited inquiry "into any juvenile offenses or alleged juvenile offenses that he [Brad] may have committed." The judge said that he would let counsel ask whether Brad had been promised anything, or thought he had received something, in return for his testimony. Rather than engage in such a superficial inquiry into bias, Azbill's attorney ignored the subject, focusing his cross-examination on Brad's conflicting testimony and intoxication on the day of the crime.

After his conviction was affirmed by the Nevada Supreme Court, *Azbill v. State*, 1972, 88 Nev. 240, 495 P.2d 1064, Azbill filed this federal habeas corpus petition, which the district court denied without a hearing. In an unpublished memorandum we reversed and directed that the district court hold an evidentiary hearing to determine whether Azbill had deliberately by-passed orderly state procedure. *Azbill v. Hocker*, May 3, 1974, No.

73–1502. The district court again denied Azbill relief, concluding that "counsel's neglect . . . gave rise to the kind of waiver that should be placed in the same category [as] as 'deliberate by-pass' of state remedies, barring subsequent collateral attack in the federal courts."

The finding of deliberate by-pass rests on the erroneous assumption that counsel could be required to ask Brad "*whether* he was biased, [although] counsel was unable to make a record from which to argue *why* [Brad] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness. . . ." *Davis v. Alaska*, 1974, 415 U.S. 308, 318. This is precisely the dilemma that confronted counsel for Azbill and induced him not to cross-examine Brad about his juvenile offense.

The rule that requires counsel to preserve an objection on review should not be so applied as to require that he abandon all hope of success at trial. *See Miller v. Carter*, 9 Cir., 1970, 434 F.2d 824. Azbill is not attempting to take advantage of error which he planted. *Cf. Sanders v. United States*, 1963, 373 U.S. 1, 10. He is not asking the district judge or this court to consider the effect of a ruling to which he did not object. *Cf. U.S. ex rel. Allum v. Twomey*, 7 Cir., 1973, 484 F.2d 740, 745. On the contrary, counsel made consistent vigorous attempts, at trial and on appeal to the Nevada Supreme Court, to overturn the restrictions on cross-examination which counsel contends were unconstitutional. We cannot agree that the decision not to question Brad to the maximum of the very narrow limits permitted by the trial court's order amounted to a deliberate by-pass or waiver.[3]

The order is reversed and the case is remanded for further proceedings based upon our decision that Azbill has not by-passed state remedies.

FOOTNOTES

Page 1. 1. Two of the state's three experts opined that the cause of Rose's death was ingestion of alcohol and barbiturates. A third disagreed, thinking that she died as a result of inhaling hot flames.

Page 2. 2. Azbill has never argued, either here or in the state courts, that the District Attorney was involved in the decision by juvenile authorities not to prosecute; rather, he argues that Brad erroneously believed that there was such involvement.

Page 3. 3. Because we hold that counsel did not by-pass state procedure, it is unnecessary to determine whether Azbill participated in his counsel's tactical decisions. *See Humphrey v. Cady*, 1972, 405 U.S. 504, 517; *Fay v. Noia*, 1963, 372 U.S. 391, 439.

Appendix E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75–1182

SYLVESTER JACKSON AZBILL,

Petitioner-Appellant,

vs.

EDWIN T. POGUE, Warden, Nevada State Prison, State of Nevada,

Respondent-Appellee.

ORDER

[Filed June 7, 1976]

Before: CHAMBERS, DUNIWAY and WRIGHT, Circuit Judges

The members of the panel that decided this case unanimously voted to deny the petition for a rehearing and reject the suggestion of appropriateness of a rehearing in banc. The petition has been circulated to all active members of the court and no member of the court has requested a vote on the suggestion of a rehearing in banc.

The petition for a rehearing is denied and the suggestion of appropriateness of a rehearing in banc is rejected.